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No. 680

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

WINN C. HAMRICK, as Trustee of the Residuary Estate for the use of the net income therefrom for relief of animals coming under the care of the Indianapolis Humane Society, of the City of Indianapolis, Indiana, under the will of MARY POWELL CELME, deceased, *Petitioner*,

vs.

INDIANAPOLIS HUMANE SOCIETY, INC., a corporation, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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INDIANAPOLIS HUMANE SOCIETY, INC., a corporation, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment herein of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is printed in the Appendix hereto (App. 7a). It is reported at 272 Fed. 2d ——. The opinion of the United States District Court for the Southern District of Indiana, Indianapolis Division, is printed, beginning at page 9 of the Appendix Record on appeal used in the Court below. It is reported at 174 Fed. Supp. 403. The order of the District Court sustaining defendant's motion to dismiss the action was filed July 7, 1959 and is printed at page 8 of the Appendix Record on appeal used in the Court below.

JURISDICTION

The judgment of the Court of Appeals was entered on December 30, 1959 (App. 12a). No petition for rehearing was filed. A motion to stay the mandate from the United States Court of Appeals to the United States District Court was allowed by a Circuit Judge of said Court February 1, 1960, to permit petitioner to prepare and file this petition for writ of certiorari on or before March 1, 1960 (App. 12a). The jurisdiction of this Court is invoked under 28 United States Code, Section 1254(1).

QUESTION PRESENTED

Where a decedent's property was located in Montgomery County, Ohio, the place of her domicile at death, and her will (providing for creation of an express continuing trust) was admitted to probate by the Probate Court of said county, and

Where, without seeking appointment as trustee in conformity with the Ohio law, respondent took possession of the personal assets composing the trust as a

de facto trustee and removed the same to Indianapolis, Indiana, without the consent of said Probate Court, and

Where said Probate Court thereafter appointed petitioner as testamentary trustee:

1. Does an Indiana statute of limitations serve to divest said Ohio Probate Court of its constitutional and statutory authority and jurisdiction over the estate of its Ohio decedent to prevent the Court's fiduciary from taking possession of the trust assets to return the same to the territorial limits under the control of said Probate Court, and

2. May the order of the Ohio Probate Court, appointing petitioner trustee, be questioned or put in issue, collaterally, in a proceeding in the United States District Court wherein the Court's fiduciary seeks possession of the trust assets to return the same to the jurisdiction of said Probate Court for administration in conformity with the provisions of the decedent's last will and testament and the Ohio law.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Appendix to this petition contains the full applicable text:

(1) Of Article IV, Section 1, of the Constitution of the United States (page 1a).

(2) Of Article IV, Section 7 and 8, of the Constitution of Ohio (page 1a).

(3) Of Section 2101.24 of the Revised Code of the State of Ohio (page 2a).

(4) Of Section 2107.11 of the Revised Code of the State of Ohio (page 2a).

(5) Of Section 2109.01 of the Revised Code of the State of Ohio (page 3a).

(6) Of Section 2109.02 of the Revised Code of the State of Ohio (page 3a).

(7) Of Section 2109.04 of the Revised Code of the State of Ohio (page 3a).

(8) Of Section 2109.21 of the Revised Code of the State of Ohio (page 4a).

(9) Of Section 2109.26 of the Revised Code of the State of Ohio (page 4a).

(10) Of Section 2109.30 of the Revised Code of the State of Ohio (page 5a).

(11) Of Section 2109.58 of the Revised Code of the State of Ohio (page 6a).

STATEMENT OF THE CASE

Jurisdiction was vested in the United States District Court under Title 28, Section 1332(a)(1) of the United States Code.

Mary Powell Crume died June 15, 1935, a resident of, and with all of her estate located in, Montgomery County, Ohio. Her husband and mother survived her. Her will was admitted to probate by the Montgomery County Probate Court at Dayton, Ohio, where the estate was administered and settled.

The will made provision for three testamentary trusts, one for decedent's mother, the second for decedent's husband. Upon the death of the first two such beneficiaries, provision was made that said trusts terminate. Item VI of the will provided that the remaining assets compose a third testamentary trust, and reads, as to its pertinent part, as follows:

> After the death of my said mother, and after the death of my said husband, I give, devise and bequeath all of the trust estate and property referred to in Items IV and V of this will to the Indianapolis Humane Society, of the City of Indianapolis, Indiana, as Trustee, to have and to hold the same perpetually in trust for the sole purpose of using the net income therefrom for relief of animals which come under its care. Said last mentioned Trustee shall have no power or authority to use either the principal or income of said trust estate and property to pay for buildings, equipment, salaries or any expenses other than relief of said animals. . . ."

An action was commenced in the Montgomery County Probate Court for a declaratory judgment that said third trust "be declared null and void and of no effect". The litigation terminated with an agreed order that the trust provision was not "null and void and of no effect" and the Probate Court authorized the transfer of the trust estate, consisting entirely of personal property, to the respondent, as Trustee, in May, 1940. Without posting a bond or seeking letters of appointment by said Probate Court as trustee, respondent took possession of said personal property and removed it immediately and without the consent of the court to Indianapolis, Indiana.

In July, 1957, respondent commenced an action for declaratory judgment in the Probate Court of Marion County, Indiana, seeking to be relieved of any restraint (imposed under the terms of the testamentary trust) in the use of the funds. Summons was issued thereon by the Marion County Indiana Probate Court to decedent's heirs at law, who learned for the first time and brought to the attention of the Montgomery County Probate Court

(i) that respondent had not posted a bond with nor sought and received appointment by the Montgomery County Probate Court, as Trustee.

(ii) that respondent did not file an inventory of the assets nor accounts of its administration of the trust with the Montgomery County Probate Court as required by the Ohio law.

After notice to the respondent of the time and place of a hearing, the Ohio Probate Court heard the matter on October 29, 1957, and thereafter on January 22, 1958, rendered a written opinion (App. 13a) and filed its court order February 4, 1958 (App. 18a) appointing the petitioner Testamentary Trustee by reason of the vacancy of the office and thereafter ordered the Trustee to take possession of the assets and return them to the jurisdiction of said Montgomery County, Ohio Probate Court.

Petitioner commenced an action against respondent in the United States District Court at Indianapolis seeking a decree ordering respondent to deliver the trust property to petitioner and to render an accounting with respect thereto during the period it held the same. (Page 2 of the Appendix Record on appeal used in the Court below).

Respondent moved to dismiss the action (Page 8 of the Appendix Record on appeal used in the Court below). The motion was sustained and the action was dismissed by the order of the District Court. The United States Court of Appeals for the Seventh Circuit affirmed the lower court's decision by its order filed December 30, 1959.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals is in conflict with the settled law of the State of Ohio in an area of public and great general interest so as to compromise the constitutional and statutory authority and jurisdiction of an Ohio court.

The testator's property was located in Montgomery County, Ohio, where she was domiciled at the time of her death. Her will was admitted to probate in the county of her domicile in accordance with Section 2107.11 of the Revised Code of the State of Ohio. That Court had exclusive jurisdiction to direct the administration of decedent's estate and to appoint and control the conduct of any testamentary trustee under the provisions of Section 2101.24 of the Revised Code of the State of Ohio.

Every fiduciary, as defined in Section 2109.01 of the Revised Code of the State of Ohio, which includes a testamentary trustee, is required under the provisions of Section 2109.04 of the Revised Code of the State of Ohio, to give bond in double the probable value of the personal estate before letters of appointment may be issued to the person as testamentary trustee under the will. *Winters Bank, as Trustee* v. *Ross*, 169 O.S. 335.

Under the terms of Section 2109.02 of the Revised Code of the State of Ohio, every testamentary trustee must receive letters of appointment, from the Probate Court having jurisdiction of the subject matter of the trust, before entering upon the execution of the trust, and no act is valid prior to the issuance of such letters of appointment.

The respondent took possession of the assets of the trust without posting a bond and without seeking ap-

pointment as testamentary trustee at the hands of Montgomery County Probate Court.

The decedent's heirs at law first became aware of respondent's failure to comply with the Ohio law when they were summoned to appear in the Marion County, Indiana Probate Court to answer respondent's law suit seeking a declaratory judgment with respect to said trust property based on the following allegations:

> "9. Because of the appreciation in the trust corpus, said trust has become excessive for the purpose of carrying out the wishes of said Mary Powell Crume in the way she prescribed in her last will and testament quoted in rhetorical paragraph 1 above.
>
> "10. Said trust should be used to carry out the dominant charitable purpose stated in said will without further notice to defendants, and each of them, under the direction of this Court free from the requirements of said will (a) that only the net income from the trust be used, and (b) that neither principal nor income be used to pay for buildings, equipment, salaries or any expenses other than relief of animals."

The foregoing facts were brought to the attention of the Montgomery County Probate Court as was the fact that no inventory of the trust assets had been filed with said Court in conformity with the duties imposed under Section 2109.58 of the Revised Code of the State of Ohio, and no accounts had been filed in conformity with the duties imposed under Section 2109.30 of the Revised Code of the State of Ohio.

The Ohio Probate Court caused notice (conforming with the law of Ohio) to be given respondent to appear October 29, 1957, at a hearing to consider the appointment of a testamentary trustee. Respondent did not

enter its appearance at the hearing but its counsel was present and argued orally and by brief as amicus curiae.

The Probate Court found that respondent's refusal to post a bond and seek letters of appointment as trustee amounted to a refusal to accept the office as trustee, and on February 4, 1958 (App. 18a) appointed petitioner as Testamentary Trustee to carry out the decedent's purpose expressed in her will, under the provisions of Section 2109.26 of the Revised Code of the State of Ohio.

There was no defect in the order nor in the jurisdiction of the Montgomery County Probate Court to make the same. If there had been a defect, the remedy of appeal was available to the respondent. The order cannot be collaterally attacked in a proceeding in the United States District Court seeking to enforce petitioner's right to possession of the trust property.

Article IV, Section 1, of the Constitution of the United States provides that full faith and credit shall be given the judicial proceedings of the Montgomery County, Ohio Probate Court and should serve petitioner in the United States District Court and in the United States Court of Appeals for the Seventh Circuit. The reasons for the issuance of the Probate Court order could not be relitigated in the Federal Court. The issues in the Probate Court case, i. e., the appointment of a testamentary trustee, were adjudicated. No appeal having been taken, respondent was estopped by that judgment which was also res judicata of the question. *Cromwell* v. *Sac*, 94 U.S. 351.

The charitable trust created under decedent's will, including its administration, was governed by and sub-

ject to the laws of Ohio. The Montgomery County, Ohio Probate Court was the primary lawful custodian of the trust property. The Testamentary Trustee, appointed by the Court, merely acts as the Court's instrument or agent in administering the trust. The Ohio Supreme Court covered this precise point in the case of *Lozier* v. *Lozier*, 99 O.S. 254, in the following words:

> "Property does not pass under will by any natural right. Its transmission by way of inheritance or otherwise, after death, is solely by virtue of our statutes. When this will was made by a resident of Ohio and offered and admitted to probate in the state of Ohio, it became an Ohio instrument, creating an Ohio trust, to be administered agreeable to Ohio law, unless the terms and provisions of the instrument clearly indicated some specific terms or provisions clearly showing a contrary intention on the part of the testatrix. That the testamentary trustees were residents of New York is not enough to show such contrary intention. The presumption is that they were selected for personal confidence, rather than geographical location—rather than mere jurisdiction as to the administration of the trust.
>
> "It is not enough that the securities had as their situs the city and state of New York. Being personal property their domicile is ambulatory and follows their lawful custodian. Under the Ohio law the primary lawful custodian of this trust is the probate court of Cuyahoga county, Ohio, and the testamentary trustees mentioned in the will are simply the instruments or agents of the court of Ohio in the administration of the trust.
>
> "The law of Ohio, having authorized the will and the probate of the will, also fixed the terms and conditions for the administration of the trust created by the will."

Petitioner acted as the arm of the Ohio Probate Court—the only lawful custodian of the trust property—in obedience to that Court's order to commence this action in the United States District Court at Indianapolis to secure possession and the return of the trust property to the jurisdiction of the primary lawful custodian.

The Ohio Probate Courts are constitutional courts, *Re Estate of Miller*, 160 O.S. 529, and, as such, are arms of the sovereign state. Time does not run against the sovereign. See *Lindsey et al* v. *Miller*, 31 U.S. 666, *Gibson* v. *Chouteau*, 80 U.S. 92, 99, *Seeley* v. *Thomas*, 31 O.S. 301, 308, *State of Ohio* v. *The Board of Public Works*, 36 O.S. 409, 414.

No statute of limitations, not even the statute of limitations of the State of Indiana, is available to divest an Ohio court of its exclusive, continuing authority and jurisdiction over the personal property composing the estate of an Ohio resident being lawfully administered in said Court.

In all events, petitioner's cause of action against respondent accrued under the law of the State of Ohio, and the time of such accrual must be determined in accordance with the law of Ohio.

Under the Ohio law, no cause of action accrues until someone entitled to prosecute the action as in existence. *Hoiles* v. *Riddle*, 74 O.S. 173. No testamentary trustee was in existence until petitioner received his appointment, and a statute of limitations cannot begin to run until that time. *State ex Rel. Lien* v. *House*, 144 O.S. 238.

In many states, the fiduciary named in a decedent's will has a vested right to the office. In Ohio, a fiduciary

named in a will is not entitled to the trust as a matter of right. It is left to the sound discretion of the Probate Court of the county of decedent's domicile, under Section 2109.02 of the Revised Code of the State of Ohio, to determine whether the fiduciary named in the will shall receive letters of appointment as such trustee. See *In Re Estate of Bowman*, 76 O.L.A. 597, 143 N.E. 2d 150. As further evidence of the discretionary power vested in the Probate Court, Section 2109.21 of the Revised Code of the State of Ohio specifically authorizes the Probate Court to refuse to issue letters of appointment to a trustee named in a will who is a nonresident of the state. The wisdom of that statute is demonstrated by the problems which inspired this litigation.

Respondent argued in the Court of Appeals below that, having escaped the state with the trust assets, it was under no obligation

(i) to comply with the laws of the State of Ohio respecting the trust of its resident decedent,

(ii) to account nor submit to the jurisdiction of the Ohio Probate Court.

If full faith and credit shall be given to the orders of the Ohio court, in this litigation commenced in a United States Court, then petitioner should be regarded as the only lawful trustee entitled to the possession of the assets of said trust. At best, the respondent holds said assets as a de facto trustee. At next best, if reliance be placed on its argument, it holds the assets as a trustee ex maleficio. In any event, it does not divest the Ohio Probate Court of jurisdiction over the trust by the simple expedient of stepping across a state line carrying all of the assets which were portable.

See *Boone* v. *Wachovia Bank and Trust Co.*, 163 Fed. 2d 809 (D.C. Circuit.)

CONCLUSION

The decision of the court below presents compelling reasons for review by this Court.

1. It determined a question of law governed by the law of the State of Ohio contrary to the law of that state.

2. It modifies, contrary to the Ohio law, the constitutional and statutory powers and jurisdiction of the Ohio Probate Court, to supervise express continuing trusts and estates of persons domiciled in Ohio at the time of death.

3. It imposes a statute of limitation of the State of Indiana to divest the Ohio Probate Court, an arm of a sister sovereign state, of its continuing jurisdiction of an estate in the process of administration in said Ohio court.

4. It *fails to* give full faith and credit to the lawful orders of an Ohio court vested with jurisdiction in the matter as to which the order pertained.

5. It covers a matter of public and great general interest that has not been, but should be, decided by this Court.

For the foregoing reasons this petition for writ of certiorari should be granted.

Respectfully submitted,

P. EUGENE SMITH
Attorney for Petitioner

APPENDIX

APPENDIX

Constitutional Provisions and Statutes Involved

Article IV, Section 1 of the Constitution of the United States:

"Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

Article IV, Sections 7 and 8, of the Constitution of Ohio:

"7. *Probate Courts.*

"There shall be established in each county, a probate court, which shall be a court of record, open at all times, and holden by one or more judges, as the general assembly may determine by law, elected by the electors of the county, who shall hold the office for the term of six years, and shall receive such compensation as shall be provided by law. Whenever ten per centum of the number of electors voting for governor at the next preceding election in any county having less than sixty thousand population as determined by the next preceding federal census, shall petition the judge of the court of common pleas of any such county not less than ninety days before any general election for county officers, the judge of the court of common pleas shall submit to the electors of such county the question of combining the probate court with the court of common pleas, and such courts shall be combined and shall be known as the court of common pleas in case a majority of the electors voting upon such question vote in favor of such combination. Notice of such election shall be given in the same manner as for the election of county officers. Elections may be had in the same manner for the separation of such courts, when once combined."

"8. *Their Jurisdiction.*

"The Probate court shall have jurisdiction in probate and testamentary matters, the appointment of administrators and guardians, the settlement of the accounts of executors, administrators and guardians, and such jurisdiction in habeas corpus, the issuing of marriage licenses, and for the sale of land by executors, administrators, and guardians and such other jurisdiction, in any county, or counties, as may be provided by law."

Section 2101.24 of the Revised Code of the State of Ohio:

"Except as otherwise provided by law, the Probate Court has jurisdiction: . . .

"(B) To grant and revoke letters testamentary and of administration;

"(C) To direct and control the conduct and settle the accounts of executors and administrators and order the distribution of estates;

"(D) To appoint and remove guardians and testamentary trustees, direct and control their conduct, and settle their accounts; . . .

"(M) To direct and control the conduct of fiduciaries and settle their accounts; . . .

"Such jurisdiction shall be exclusive in the Probate Court unless otherwise provided by law. . . ."

Section 2107.11 of the Revised Code of the State of Ohio:

"A will shall be admitted to probate:

"(A) In the county in which the testator was domiciled if, at the time of his death, he was domiciled in this state;

"(B) In any county of this state where any real or personal property of such testator is located if, at the time of his death, he was not domiciled in this state, and pro-

vided that such will has not previously been admitted to probate in this state or in the state of such testator's domicile.

"For the purpose of this section, intangible personal property is located in the place where the instrument evidencing a debt, obligation, stock, or chose in action is located or if there is no such instrument where the debtor resides."

Section 2109.01 of the Revised Code of the State of Ohio:

" 'Fiduciary' . . . means any person, association, or corporation . . . appointed by and accountable to the probate court and acting in a fiduciary capacity for any person, association, or corporation, or charged with duties in relation to any property, interest, trust, or estate for the benefit of another."

Section 2109.02 of the Revised Code of the State of Ohio:

"Every fiduciary, before entering upon the execution of a trust, shall receive letters of appointment from a probate court having jurisdiction of the subject matter of the trust.

"The duties of a fiduciary shall be those required by law, and such additional duties as the court orders.

"No act or transaction by a fiduciary shall be valid prior to the issuance of letters of appointment to him. This section does not prevent an executor named in a will from paying funeral expenses or prevent necessary acts for the preservation of the trust estate prior to the issuance of such letters."

Section 2109.04 of the Revised Code of the State of Ohio:

"Every fiduciary shall, prior to the issuance of his letters as provided by section 2109.02 of the Revised Code, file in the probate court in which the letters are to be issued a bond with a penal sum in such amount as may be fixed by the

court, but in no event less than double the probable value of the personal estate and of the annual real estate rentals which will come into such person's hands as a fiduciary. The penal sum of the bond of a guardian of the person only shall be double the probable expenditures to be made by such guardian for the ward during one year. Such bond shall be in a form approved by the court and signed by two or more personal sureties, or by one or more corporate sureties approved by the court and shall be conditioned that the fiduciary will faithfully and honestly discharge the duties devolving upon him as such fiduciary, and shall be conditioned further as may be provided by law; provided that if the instrument creating the trust dispenses with the giving of a bond the court shall appoint a fiduciary without bond, unless the court is of the opinion that the interest of the trust demands it, in which event the court may require bond to be given in such amount as may be fixed by the court. . . ."

Section 2109.21 of the Revised Code of the State of Ohio:

. ."If the . . . trustee named in a will is a non-resident of this state, the probate court may refuse to issue letters of appointment to such person."

Section 2109.26 of the Revised Code of the State of Ohio:

"If a sole fiduciary dies, is dissolved, declines to accept, resigns, is removed, or becomes incapacitated prior to the termination of the trust, the probate court shall require a final account of all dealings of such trust to be filed forthwith by such fiduciary if a living person and able to act.

. . . .

"Whenever such a vacancy occurs and such contingency is not otherwise provided for by law or by the instrument creating the trust, or whenever such instrument names no fiduciary, the court shall, on its own motion or on the application of any person beneficially interested, issue letters

of appointment as fiduciary to some competent person or persons who shall qualify according to law and execute the trust to its proper termination. Such vacancy and the appointment of a successor fiduciary shall not affect the liability of the former fiduciary or his sureties which was previously incurred."

Section 2109.30 of the Revised Code of the State of Ohio:

"Within nine months after his appointment, every executor and administrator shall render an account of his administration and shall render further accounts at least once each year thereafter. Every other fiduciary shall render an account of the administration of his estate or trust at least once in each two years. An account shall be rendered by any fiduciary at any time other than that mentioned in this section upon the order of the court either at its own instance, or upon the motion of any person interested in the estate or trust for good cause shown. Every fiduciary shall render a final account within thirty days completing the administration of the estate or the termination of his trust, or within such other period of time as the court may order.

"Every account shall include an itemized statement of all receipts of the fiduciary during the accounting period and of all disbursements and distributions made by him during such period, verified by vouchers or proof. In addition the account shall include an itemized statement of all funds, assets, and investments of the estate or trust known to or in the possession of the fiduciary at the end of the accounting period and shall show any changes in investments since the last previous account. The accounts of testamentary trustees shall, and the accounts of other fiduciaries may, show receipts and disbursements separately identified as to principal and income.

"Every account shall be upon the signature and oath of the fiduciary. When an account is rendered by two or

more joint fiduciaries, the court may allow the account upon the signature and oath of one of them.

Upon the filing of every account the fiduciary shall exhibit to the court, for its examination, the securities shown in said account as being in the hands of the fiduciary or the certificate of the person in possession of such securities, if held as collateral or pursuant to section 2109.13 of the Revised Code, and a passbook or certified bank statement showing as to each depository the fund deposited therein to the credit of the trust. When such securities are located outside the county, the court may appoint a commissioner to make such examination and report his findings to the court. The court may examine the fiduciary under oath touching the account. . . ."

Section 2109.58 of the Revised Code of the State of Ohio:

"Each fiduciary . . . shall within three months after his appointment make and file a full inventory verified by oath of the real and personal estate belonging to the trust, its value and the value of the yearly rent of the real estate. . . ."

Opinion Below

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 12750 SEPTEMBER TERM AND SESSION, 1959.

WINN C. HAMRICK, as Trustee of the Residuary Estate for the use of the net income therefrom for the relief of animals coming under the care of the Indianapolis Humane Society of the City of Indianapolis, Indiana, under the will of MARY POWELL CRUME, DECEASED, *Plaintiff-Appellant*;

v.

INDIANAPOLIS HUMANE SOCIETY, INC., a corporation, *Defendant-Appellee.*

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division

December 30, 1959

Before DUFFY, SCHNACKENBERG and KNOCH, *Circuit Judges.*

DUFFY, *Circuit Judge.* Plaintiff brought this suit as Trustee of a testamentary trust to obtain a decree ordering defendant to deliver trust property in its possession to plaintiff, and to render an accounting. The estimated present value of the trust assets is $750,000.00. Defendant moved to dismiss the action for the reasons: 1) the complaint failed to state a claim upon which relief could be granted; 2) the alleged claim was barred by the statute of limitations; and 3) the plaintiff lacked capacity to sue. The District Court sustained the motion to dismiss basing its ruling on the Indiana Statutes of Limitations. Sections 2-601, *et seq.* Burns' 1946 Replacement.

The complaint alleges Mary Powell Crume died in 1935, a resident of Montgomery County, Ohio. Her will, probated in the Probate Court of Montgomery County, Ohio

named the Indianapolis Humane Society, Inc. as Trustee of the residuary estate, to hold the same perpetually for the sole purpose of using the net income therefrom for the relief of animals which should come under its care.

In 1940, a proceeding was brought in the Probate Court of Montgomery County, Ohio, by the administratrix of the estate of Roscoe A. Crume, challenging the validity of the residuary bequest. Defendant herein appeared in that litigation, claiming the bequest created a valid charitable trust. The Court sustained the validity of the trust, and ordered the residue of the estate, consisting entirely of personal property, turned over to the Indianapolis Humane Society, Inc., as Trustee. Possession of the trust corpus was obtained by defendant in 1940 and was removed to the state of Indiana wherein the trust has since been administered.

The complaint alleged that under the laws of Ohio, no trustee may lawfully enter upon the execution of a trust until the issuance of letters of appointment by the Probate Court having jurisdiction, and that defendant, Indianapolis Humane Society, Inc., never sought nor received letters of appointment as trustee from the Probate Court of Montgomery County.

The statute referred to is Section 2109.02 of the Revised Code of Ohio, and provides:

> "Every fiduciary, before entering upon the execution of a trust, shall receive letters of appointment from a Probate Court having jurisdiction of the subject matter of the trust.
>
> "The duties of a fiduciary shall be those required by law and such additional duties as the Court orders.
>
> "No act or transaction by a fiduciary shall be valid prior to the issuance of letters of appointment to him."

Section 2109.01 of said Revised Code provides:

> "'Fiduciary' * * * means any person * * * appointed by and accountable to the Probate Court and acting in a fiduciary capacity for any person * * * or charged with duties in relation to any property, interest, trust or estate for the benefit of another."

On October 9, 1957, plaintiff Hamrick made application to the Probate Court of Montgomery County, Ohio, to be appointed Trustee of said trust. Apparently Hamrick had no personal interest in the estate of Mary Powell Crume, and claims none now. A hearing was held on said petition. Defendant did not appear formally but attorneys employed by defendant appeared as *amici curiae* and filed a brief opposing the relief sought. On February 4, 1958, the Ohio court appointed plaintiff as Trustee, and letters of appointment were issued to him. Thereafter, by letter, he demanded that defendant surrender the trust assets to him and to render an accounting. On June 24, 1958, said Probate Court authorized plaintiff to commence an action to secure possession of the trust property and to bring said assets physically within the jurisdiction of the Probate Court of Montgomery County, Ohio.

There is no claim here of any breach of trust duties. No argument is made that the intention of the testatrix in establishing the trust has not been fully carried out. This lawsuit is based on the technical point that letters of appointment never were issued to defendant Humane Society as testamentary Trustee.

There are many facts of possibly controlling interest that are not before us as this controversy comes to us on an appeal from a motion dismissing the complaint. We do not know why the Probate Court of Montgomery County failed to take action for more than seventeen years, and then authorized a stranger to the estate proceedings to bring this suit. We know nothing as to whether

annual or other reports were made to the Ohio court. We do not know if an order has been entered in the Ohio court expressly removing the defendant Humane Society as testamentary Trustee. On this point, plaintiff argues that as he was appointed Trustee, there was a removal by implication.

It is clear from the record before us that the trust property in question was transferred to the defendant Humane Society in 1940 by the express order of the Probate Court of Montgomery County, Ohio. It is not so clear but we so infer from the argument that the trust property was transferred to the state of Indiana with the knowledge and consent of the Court.

The issue before us is the contention of defendant that the claim set forth in the complaint accrued, if at all, in the year 1940 when defendant received possession of the trust property without first obtaining letters of appointment from the Court. In Indiana, actions for the recovery of personal property must be brought within six years, and all other actions within fifteen years. (Sections 2-601 to 2-627, Burns' 1946 Replacement).

Plaintiff cites authorities holding a refusal by a trustee to obey orders of the Court is ground for removing said trustee even though such trustee has been appointed by the will of a deceased. But there is no showing here that the defendant Humane Society ever refused to obey an order of the Probate Court of Montgomery County, Ohio. In fact, it is clear that when the Court ordered the trust funds to be turned over to the Humane Society in 1940, the Court knew it was an Indiana corporation which carried on its business in Indianapolis, Indiana. As far as we know, the Probate Court never suggested to this foreign corporation that under Ohio law a trustee should first obtain letters of appointment before receiving trust funds.

Plaintiff argues that before a suit could be brought against defendant, which in 1940 received the trust property under color of authority, a demand for a return of the property was necessary and this demand was made in the instant case in February, 1958. Plaintiff says he could not have made the demand earlier because he was not appointed Trustee until February 14, 1958.

Plaintiff contends and cites authorities for the proposition that under Ohio law, the primary lawful custodian of this trust fund is the Probate Court of Montgomery County, Ohio. In plaintiff's briefs and on oral argument, it was emphasized that the trustee was merely the Court's agent or figurehead to act for the Court in bringing the suit.

A plaintiff cannot indefinitely suspend the statute of limitations by delaying action. If a demand must be made as a preliminary step, it must be made within a reasonable time, that is, within the period of the statute of limitations. *High et al.* v. *Board of Commissioners of Shelby County*, 92 Ind. 580, 587; *Hitchcock* v. *Cosper*, 164 Ind. 633, 643-644. As the trial court pointed out, if the rule were otherwise a party, by failing to act, could preclude the running of the statute of limitations until such time as might suit his convenience or pleasure. Statutes of limitation are statutes of repose and are favored by the courts. *Woods* v. *Carpenter*, 101 U.S. 135, 139.

The Probate Court of Montgomery County could have appointed an agent or trustee to act for it at any time since 1940. The delay of seventeen years was the delay of the Court. The fact that it must act through an agent or trustee to bring the suit should make no difference. The trustee has no personal interest in the trust funds. We think the District Court was correct under the circumstances of this case in sustaining the motion to dis-

miss on the ground that plaintiff's claim is barred by the Indiana Statutes of Limitation.

AFFIRMED.

A true Copy:
Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.

Judgment Below

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Indiana, Indianapolis Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this Court filed this day.

Mandate Below

On consideration of the motion and affidavit of counsel for plaintiff-appellant for order to recall the mandate of this Court heretofore issued in the above entitled appeal, and the answer of counsel for defendant-appellee thereto,

IT IS ORDERED that the mandate of this Court heretofore issued to the United States District Court for the Southern District of Indiana, Indianapolis Division, on January 21, 1960, be, and the same is hereby, recalled and stayed to and including March 1, 1960, without security; but if a larger period is requested by counsel for plaintiff-appellant, security under 28 U.S.C. 2110(f) will be required.

Probate Court Decision

IN THE PROBATE COURT OF MONTGOMERY COUNTY, OHIO

Case No. 140379
Doc. 42 Page 49

In the Matter of the Trusteeship of the residuary estate and the use of the net income therefrom for relief of animals coming under the care of the Indianapolis Humane Society of the City of Indianapolis, Indiana, under the will of Mary Powell Crume, Deceased

OPINION January 22, 1958

LOVE, J:

This matter is before the Court on application of Winn C. Hamrick to be appointed testamentary trustee of the residuary estate under the last will and testament of Mary Powell Crume, deceased.

Mary Powell Crume died testate on the 15th day of June, 1935, domiciled in and a resident of Montgomery County, Ohio. Her will was admitted to probate, an executor was appointed, and the estate was administered and settled by this Court. A testamentary trustee and later a successor testamentary trustee were appointed in conformity with Item IV of the will for the benefit of the decedent's mother, Nellie Cunningham Powell.

On the 3d day of February, 1940, shortly after the death of Nellie Cunningham Powell, a petition for a declaratory judgment was filed in this Court by Emma Crume Lytle, administratrix of the estate of Roscoe Andrew Crume, surviving spouse of Mary Powell Crume, praying that the Court declare Item VI of the will null and void and that the trust created therein never came into existence. Roscoe Andrew Crume died intestate on the 9th day of November, 1936.

Item VI of Mary Powell Crume's will provided that after the deaths of Nellie Cunningham Powell, the mother of the decedent, and Roscoe Andrew Crume, surviving spouse of the decedent, the remainder of the estate should pass to the Indianapolis Humane Society of Indianapolis, Indiana, as trustee, to be used for the "relief of animals" which would come under the care of the Society.

The Indianapolis Humane Society of Indianapolis, Indiana, was made a party defendant to the declaratory judgment proceeding. The Society appeared and filed an answer and cross-petition alleging that it was a duly incorporated charitable organization under the laws of the State of Indiana, that the residuary estate was left to it in trust, and that Item VI was ambiguous. The purposes of the said Society were alleged in its answer and cross-petition to ". . . include emergency relief for human beings, the care, handling, welfare and relief of animals in a humane manner, the promotion of humane legislation, the prevention of cruelty to the aged and children and to all dumb animals, . . ."

On the 11th day of May, 1940, the Court journalized an entry in which the Court found that the parties had reached an agreement on their differences and had settled the controversy which had arisen among them. After ordering payment of certain specific sums in accordance with the agreement of the parties and ordering the transfer and the payment of the residue of the trust estate to the Indianapolis Humane Society of Indianapolis, Indiana, the Court determined that Item VI of the last will and testament of Mary Powell Crume was ambiguous. In resolving the ambiguity, the Court declared that the Indianapolis Humane Society of Indianapolis, Indiana, "shall have the right in its discretion to use either the principal or the income of said trust estate and property so bequeathed to it under said Item VI in order to pay for buildings, equipment, salaries or any expenses for the care or relief of animals which may come under its care, and for no other purpose."

Distribution was made directly to the Indianapolis Humane Society, without the appointment of a trustee under Item VI of the will of Mary Powell Crume, and such distribution was reported in the first and final account of the successor trustee filed in this Court on the 27th day of May, 1940.

A hearing was held on the 29th day of October, 1957, relative to the appointment of Winn C. Hamrick as trustee under said Item VI of the will of the decedent. Kenneth O. Shively appeared amicus curiae, representing unknown principals, opposing such appointment. The primary contention of the amicus curiae is that this Court is without jurisdiction to appoint a trustee.

Applicant introduced a copy of a petition filed in the Probate Court of Marion County, Indiana, Case No. 5222, wherein the Indianapolis Humane Society seeks a declaratory judgment of that court that it, as trustee, should use the trust estate to carry out its dominant purpose without further notice to defendants named in said suit, free from the requirements of the will.

The sole question is whether the Court should appoint a trustee under Item VI of the will of Mary Powell Crume for the relief of animals coming under the care of the Indianapolis Humane Society.

The Court has thoroughly examined the briefs of both counsel for the applicant and the amicus curiae; and, upon careful consideration, the Court is of the opinion that the appointment of a trustee as applied for is proper.

To create a valid charitable trust there must exist a gift for a public use which is not contrary to law or public policy. It must appear that the testator intended to create a charity. There must also be a definite charitable object indicated by the testator and this object must be sufficiently certain as to be capable of ascertainment. There must also, of course, be a trustee. *Thompson on Wills*, 2d Ed., Testamentary Trusts, Section 441, page 534.

In the trust created under the will of Mary Powell Crume there was a gift for a general public use. It is well recognized that the relief of animals is a valid object of a charitable trust. *Scott on Trusts*, 2d Ed., Vol. IV, Charitable Trusts, Section 374.2, page 2671. That the trust herein is not contrary to law or against public policy is self-evident. From the will there is clear manifestation of intent to create a charitable trust. The object of such trust is certain.

The entry determinative of the declaratory judgment filed in this Court on the 11th day of May, 1940, merely provided that the trust estate for the benefit of Nellie Cunningham Powell, mother of the decedent herein, should terminate and the funds be paid over to the parties. The Court did not find that Item VI of the will did not constitute a trust although the plaintiff prayed for a declaration as to its invalidity. On the contrary, all through the proceedings the remainder of the funds after the death of Nellie Cunningham Powell was referred to as constituting a trust fund.

Before entering upon the execution of a trust, the mandatory statutory requirement imposed by Section 2109.02, R.C.O., requiring that letters of appointment be issued to every fiduciary by the probate court having jurisdiction, must be complied with. The term "fiduciary" under Section 2109.02, R.C.O., is defined by Section 2109.01, R.C.O., so as to encompass "trustee."

This Court had and retains complete jurisdiction of the trust estate. The testator was domiciled in and a resident of Montgomery County at the time of her death. Her will was admitted to probate, an executor was appointed, and the estate was administered and settled by this Court. The testamentary trustee and later a successor testamentary trustee were appointed by this Court in conformity with Item IV of the will for the benefit of the decedent's mother, Nellie Cunningham Powell. This Court has never relin-

quished control or lost jurisdiction over this estate or trust arising under the will of the decedent, Mary Powell Crume.

The Indianapolis Humane Society, nominated by the testatrix as trustee, failed to seek the office of trustee. Therefore, under Section 2109.02, R.C.O., as referred to above, the actions of the Society since receiving the funds were invalid. Furthermore, the evidence shows that the Indianapolis Humane Society has, without receiving letters of appointment from this Court, instigated a law suit in a court in Indiana as trustee with respect to corpus created by a will of a person domiciled and dying testate in Montgomery County, Ohio; consequently, there is a serious question whether the court in Indiana has jurisdiction.

It is a proposition of the law of Ohio that no trust shall fail for want of a trustee. Such proposition requires no citation. The failure of the Indianapolis Humane Society to seek letters of appointment as trustee for this length of time can be construed in no other light than that they had declined the office. Hence, the Court has a duty under Section 2109.26, R.C.O. to appoint some suitable person as a trustee of the trust created for the relief of animals under the last will and testament of Mary Powell Crume to protect the interests of all the parties who are or could be interested in said trust. For the foregoing reasons the application of Winn C. Hamrick is well taken, and the Court finds him to be a suitable person for the office of trustee.

Counsel may present an appropriate entry.

Costs to the trust estate.

P. Eugene Smith
Attorney for Applicant

Kenneth O. Shively
Amicus Curiae

Probate Court Order

ENTRY

This day this cause came on to be heard:

On the application of Winn C. Hamrick for appointment as testamentary trustee of the residuary estate for the use of the net income therefrom for relief of animals coming under the care of the Indianapolis Humane Society of the City of Indianapolis, Indiana, under the will of Mary Powell Crume, deceased:

On the records of the estate and testamentary trusts therein, of Mary Powell Crume, deceased, all pending in and constituting the records of this Montgomery County Probate Court, of which the Court takes judicial notice;

On the evidence introduced at a hearing held October 29th, 1957.

The Court being fully advised in the premises FINDS that:

Mary Powell Crume died testate, on the 15th day of June, 1935, domiciled in and a resident of Montgomery County, Ohio; and her will was admitted to probate, an executor was appointed, and the estate was administered and settled by the Montgomery County Probate Court;

A testamentary trustee and later a successor testamentary trustee were appointed by this Court in conformity with Item IV of decedent's will, for the benefit of decedent's mother, Nellie Cunningham Powell;

On the 3rd day of February, 1940, shortly after the death of Nellie Cunningham Powell, Emma Crume Lytle, Administratrix of the Estate of Roscoe Andrew Crume, who died intestate on the 9th day of November, 1936, as the surviving spouse of Mary Powell Crume, filed a Petition for a declaratory judgment praying that this Court declare Item VI of the will null and void and to declare that the trust

created therein for the relief of animals coming under the care of the Indianapolis Humane Society of the City of Indianapolis, Indiana, to take effect after the death of Nellie Cunningham Powell, the mother of the decedent, and Roscoe Andrew Crume, surviving spouse of the decedent, never came into existence;

The Indianapolis Humane Society of Indianapolis, Indiana, was made a party defendant in, appeared and filed an Answer in and Cross Petition to the declaratory judgment proceeding, aforesaid, claimed that it was a charitable organization, incorporated under the laws of the State of Indiana with purposes which include emergency relief for human beings, the care, handling, welfare and relief of animals in a humane manner, the promotion of humane legislation, the prevention of cruelty to the aged and children and to all dumb animals; that the residuary estate was left to said Society in trust, and that Item VI thereof was ambiguous.

On the 11th day of May 1940, this Court journalized an Entry in which the Court found that the parties to the action were in agreement and had settled the controversy arising on the issues made in the pleadings - - - ordered payment of certain specific sums in accordance with the agreement of the parties and ordered transfer and payment of the residue of the trust estate to the Indianapolis Humane Society of Indianapolis, Indiana, and determined that Item VI of the last will and testament of Mary Powell Crume was ambiguous and resolved the ambiguity;

On May 27, 1940, the successor trustee for the benefit of Nellie Cunningham Powell, under the will of Mary Powell Crume, deceased, delivered the residue of the trust property directly to the Indianapolis Humane Society, without the appointment of a trustee under Item VI of the will of Mary Powell Crume and reported such distribution in the First and Final Account of said successor trustee;

The Indianapolis Humane Society filed a Petition in the Probate Court of Marion County, Indiana, Case No. 5222, seeking a declaratory judgment of said Indiana Court that the petitioner, as trustee, should use the trust estate to carry out its dominant purpose without further notice to defendants, heirs at law, from, through or under Mary Powell Crume, deceased, named in said suit, free from the requirements of said decedent's will;

That the trust created under Item VI of the decedent's will clearly manifested an intent to create a charitable trust, the object of which, the relief of animals coming under the care of the Indianapolis Humane Society, is certain, valid, and not contrary to law nor against public policy, and to accomplish the testator's purpose, a trustee must be appointed;

This Court's order in the action for declaratory judgment, filed May 14, 1940, provided for the termination of the trust estate for the benefit of Nellie Cunningham Powell, mother of the deceased testator herein - - - did not grant the prayer of plaintiff's Petition to declare that Item VI of the will was not valid and failed to create a trust but, on the contrary, throughout the proceedings referred to the remainder of the funds after the death of Nellie Cunningham Powell, as constituting a trust fund;

This Court never relinquished control nor lost jurisdiction over the estate or the trust arising under the will of Mary Powell Crume, deceased and had and retains exclusive jurisdiction of said estate and trust estate.

The Court Finds further, that:

Under Section 2019.02 of the Revised Code of the State of Ohio and in statutes in existence at the appropriate times herein, it is mandatory that Letters of Appointment be issued to every fiduciary by the Probate Court having jurisdiction of the estate or trust estate before the fiduciary

enters upon the execution of a trust and that the term "fiduciary" is defined by the Ohio statutes in effect now and heretofore so as to include a "trustee";

The Indianapolis Humane Society, nominated by the testatrix as trustee, has at all times failed to seek appointment to the office of trustee in conformity with the Ohio law and the actions of the Society in receiving and since receiving the trust funds of said estate were and are invalid including, but not limited to, the action of said Society in instigating a lawsuit in a Court in Indiana, claiming to be acting as trustee with respect to a trust created by and under the will of this decedent domiciled and dying testate in Montgomery County, Ohio and that such Indiana Court is without jurisdiction or venue to entertain such action;

Under the law of Ohio no trust shall fail for want of a trustee and the Court construes the failure of the Indianapolis Humane Society to seek Letters of Appointment by the Montgomery County Probate Court since May 1940, as that the Society declines the office;

The Court has a duty under the Ohio statutes to appoint a suitable person as a trustee of the trust created for the relief of animals under the last will and testament of Mary Powell Crume, to protect the interests of the parties who are or could be interested in said trust;

Winn C. Hamrick represents persons beneficially interested, is a suitable and competent person for the office of trustee, his application for appointment as such trustee is proper, well taken and should be granted.

It Is Therefore Ordered, Adjudged and Decreed that Winn C. Hamrick be, and he is hereby appointed trustee of the residuary estate for the use of the net income therefrom for the relief of animals coming under the care of the Indianapolis Humane Society of the City of Indianapolis, Indiana, under the will of Mary Powell Crume,

deceased and Letters of such appointment shall be and they are contemporaneously herewith issued to said Winn C. Hamrick, who has otherwise qualified for such appointment in conformity with law.

The cost of this action and application shall be and they are hereby charged against the trust estate.

APPROVED:

RODNEY M. LOVE
Probate Judge

P. EUGENE SMITH
Attorney for Winn C. Hamrick
Trustee under the Will of
Mary Powell Crume, deceased